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**Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191 (Consolidated)**

# In the Supreme Court of the United States

MOST REVEREND DAVID A. ZUBIK, *ET AL.*,
*Petitioners,*

v.

SYLVIA MATHEWS BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *ET AL.*,

*Respondents.*

[Additional Case Captions Listed Inside Front Cover]

***On Writs of Certiorari to the U.S. Court of Appeals for the Third, Fifth, Tenth, and District of Columbia Circuits***

## BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS

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PRIESTS FOR LIFE, *ET AL.*, *Petitioners*,

v.

DEP'T OF HEALTH & HUMAN SERVICES, *ET AL.*,
*Respondents*.

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ROMAN CATHOLIC ARCHBISHOP, *ET AL.*, *Petitioners*,

v.

SYLVIA BURWELL, *ET AL.*, *Respondents*.

---

E. TEX. BAPTIST UNIV., *ET AL.*, *Petitioners*,

v.

SYLVIA BURWELL, *ET AL.*, *Respondents*.

---

LITTLE SISTERS, *ET AL.*, *Petitioners*,

v.

SYLVIA BURWELL, *ET AL.*, *Respondents*.

---

SOUTHERN NAZARENE UNIV., *ET AL.*, *Petitioners*,

v.

SYLVIA BURWELL, *ET AL.*, *Respondents*.

---

GENEVA COLL., *Petitioner*,

v.

SYLVIA BURWELL, *ET AL.*, *Respondents*.

## QUESTIONS PRESENTED

The text of the Affordable Care Act says nothing about contraceptive coverage, but it does require employers to "provide coverage" for certain "preventive services," including "preventive care" for women. The Department of Health and Human Services ("HHS") has interpreted that statutory mandate to require employers through their healthcare plans to provide at no cost the full range of FDA-approved contraceptives, including some that cause abortions. Despite the obvious implications for many employers of deep religious conviction, HHS decided to exempt only some nonprofit religious employers from compliance. As to all other religious employers, HHS demanded compliance, either by instructing their insurers to include coverage in their plans, or via a regulatory mechanism through which the employers must execute documents that authorize, obligate and/or incentivize their insurers or plan administrators to use their plans to provide cost-free contraceptive coverage to their employees. In the government's view, either of those actions suffices to put these religious employers and their plans in compliance with the statutory "provide coverage" obligation.

This Court has already concluded that the threatened imposition of massive fines for failing to comply with this contraceptive mandate imposes a substantial burden on religious exercise, and that the original method of compliance violates the Religious Freedom Restoration Act ("RFRA"). And it is undisputed that this case involves the same

mandate and the same fines, and that nonexempt religious employers such as petitioners hold sincere religious objections to the regulatory method of compliance as well.

The questions presented are:

1. Does the availability of a regulatory method for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)?

2. Can HHS satisfy RFRA's demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection may not fulfill its regulatory objective – namely, the provision of no-cost contraceptives to the objector's employees?

3. Whether the Government violates RFRA by forcing objecting religious nonprofit organizations to comply with the HHS contraceptive mandate under an alternative regulatory scheme that requires these organizations to act in violation of their sincerely held religious beliefs.

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## INTEREST OF *AMICUS CURIAE*

*Amicus curiae* Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is an Illinois nonprofit corporation organized in 1981. For over thirty years, Eagle Forum has defended principles of

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[1] *Amicus* Eagle Forum files this brief with the consent of all parties; the parties' blanket consent letters have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel, contributed monetarily to preparing or submitting this brief.

limited government and individual liberty, including freedom of religion. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues presented before this Court.

## STATEMENT OF THE CASE

Picking up on issues left unresolved in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), the consolidated cases here again pit employers' religious freedom against the "contraceptive mandate" of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("ACA"). As before, defendants are federal officers and agencies primarily with the Department of Health and Human Services ("HHS" and collectively, the "Administration") who by regulation would require health insurance plans to provide coverage – indeed, *free* coverage – for "all Food and Drug Administration [("FDA")] approved contraceptive methods, sterilization procedures." *Hobby Lobby*, 134 S.Ct. at 2762 (interior quotations and alterations omitted). Plaintiffs here include both religiously oriented non-profits such as schools and charities and the religious orders that sponsor those schools and charities, as well as their employees and officers (collectively, "Petitioners").

As in *Hobby Lobby*, these actions lie in pertinent part under the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4 ("RFRA"), which – as relevant here – sets out a three-part test:

- Whether the challenged governmental actions "substantially burden" the "exercise of religion,"

regardless of whether "the burden results from a rule of general applicability." *Id.* §2000bb-1(a).

- Whether the governmental actions further "a compelling governmental interest." *Id.* §2000bb-1(b)(1).
- Whether "application of the burden to the person ... is the least restrictive means of furthering" the interest. *Id.* §2000bb-1(b)(2).

In *Hobby Lobby*, these questions easily resolved in the plaintiffs' favor – once the Court determined that closely held for-profit corporations could sue under RFRA – because the accommodation for religious non-profits that Petitioners challenge here is a *less* restrictive means of enforcing ACA's mandates than ACA's means of enforcing the mandates against the for-profit plaintiffs in *Hobby Lobby*. This Court reasoned that the Administration could therefore give the for-profit *Hobby Lobby* plaintiffs the same accommodation that the Administration had given the non-profit Petitioners here. Because "*less*" is not necessarily "*least*," *U.S. v. Playboy Entm't Group*, 529 U.S. 803, 823-24 (2000), the question presented now is whether the Administration's accommodation is less enough here.[2]

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[2] In summary, religious objectors must provide HHS with notice, which HHS then forwards to the insurance companies to ensure plan beneficiaries receive the mandated coverage from the insurance company in connection with their own health plan. 26 C.F.R. §54.9815-2713A(b)-(c); 29 C.F.R. §2590.715-2713A(b)-(c); 45 C.F.R. §147.131(c). The employer's notice remains a but-for cause of the coverage, even if employers do not pay directly for it and even if the added cost is, indeed, zero.

Thus, the Court now must decide whether that accommodation substantially burdens Petitioners' religion and constitutes the *least*-restrictive means to further the governmental interest, provided that the governmental interest at stake is compelling. *Amicus* Eagle Forum respectfully submits that no compelling interest *in ACA* supports the Administration's use of the regulatory process to impose an unprecedented federal intrusion into health coverage, particularly where the states had previously entered the fields in question before Congress enacted ACA. Under our systems of dual sovereignty between the States and the federal government, as well as of the separation of legislative and executive powers, therefore, there is simply no reason for a court to deem such purely regulatory mandates as compelling interests.

**Constitutional Background**

Under U.S. CONST. art. I, §1, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Two general presumptions underlie preemption cases. First, courts presume that statutes' plain wording "necessarily contains the best evidence of Congress' pre-emptive intent," *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), where the ordinary meaning of statutory language presumptively expresses that intent. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). Second, courts apply a presumption against federal preemption of state authority. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

**Statutory Background**

As indicated, RFRA prohibits a government's "substantially burden[ing] a person's exercise of religion," 42 U.S.C. §2000bb-1(a), unless both "in furtherance of a compelling governmental interest" and via "the least restrictive means." *Id.* §2000bb-1(b)(1)-(2). Congress enacted RFRA to restore strict-scrutiny requirements for Free-Exercise claims under *Sherbert v. Verner*, 374 U.S. 398 (1963), in response to *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), which allowed as-applied infringement of religious freedom by facially neutral government actions. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). Significantly, although this Court has held that RFRA goes further than the Constitution allows when enforcing the First Amendment *as applied to the States* via Section 5 of the Fourteenth Amendment, *City of Boerne v. Flores*, 521 U.S. 507, 516-17 (1997), RFRA applies to federal government action under whatever enumerated power Congress relied upon to authorize that federal action. *Hobby Lobby*, 134 S.Ct. at 2761.

Under the McCarran-Ferguson Act, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." 15 U.S.C. §1012(b). Congress intended the Act to safeguard the states' predominant position in regulating insurance, in the wake of this Court's holding in *U.S. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), that insurance can qualify as

interstate commerce. *See U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 499-500 (1993) ("Congress moved quickly to restore the supremacy of the States in the realm of insurance regulation").

**Regulatory Background**

Acting under ACA, the Administration has purported to require that health insurance cover without charge "all [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." 77 Fed. Reg. 8724, 8726 (2012) (alteration and interior quotations omitted) (hereinafter, the "Mandate" or "Contraceptive Mandate"). The Administration adopted the Mandate to implement ACA's general directive that "health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for ... with respect to women, such additional preventive care and screenings." 42 U.S.C. §300gg-13(a)(4). This final rule followed two interim final rules (*i.e.*, rules that did not meet notice-and-comment requirements), 75 Fed. Reg. 41,726 (2010); 76 Fed. Reg. 46,621 (2011), which together adopt the Health Resources and Services Administration's *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011).

## SUMMARY OF ARGUMENT

With respect to the free exercise of religion, the Administration has no right to impose its orthodoxy on Petitioners, and its ham-fisted attempt to define abortion as a matter of federal law is wrong as a matter of federal law and basic reproductive science (Section I.A). No principle of temporal law, much less

ecclesiastical law, limits all culpability to proximate causation, as distinct from but-for causation (Section I.B). Because government actions related to – and effects-correlated with – the ability to get pregnant are not discrimination on the basis of sex, the Mandate does not qualify as the governmental interest of remedying discrimination (Section I.C).

The Mandate does not qualify as a compelling governmental interest because Congress has not enacted it, and the Administration's promulgation of it is substantively *ultra vires* (Section II.C). In essence, the Administration seeks to advance the broad concept of a women's health in this Court's abortion cases: "all factors – physical, emotional, psychological ... – relevant to [the woman's] well-being." *Doe v. Bolton*, 410 U.S. 179, 192 (1973), but that broad standard relates to enforcing rights that government cannot take away under the Fourteenth Amendment, not to what the government must provide – or has provided – to women under other powers (Section II.A). Under the Administration's interpretation, ACA's delegation would be impermissibly open-ended and standard-less, which counsels for avoiding that interpretation (Section II.B.4), which is all the more inappropriate in this area of traditional state regulation, where the Administration has purported to adopt preemptive rules notwithstanding the presumption against preempting state laws in fields of traditional state concern. That presumption against preemption allows this Court to interpret ACA narrowly, without resort to the Administration's interpretation (Section II.B.3). Similarly, because ACA does not regulate the

"business of insurance" as the McCarran-Ferguson Act uses that term, ACA does not preempt state law, which counsels against the Administration's broad interpretation of "preventive care" beyond the context of preventing *disease* (Section II.B.2). Viewed without deference to the Administration and with deference instead to the states in our federalist system, ACA's plain language with respect to "preventive care" means preventing *disease*, not preventing pregnancy (Section II.B.1).

## ARGUMENT

### I. THE MANDATE BURDENS RELIGION.

RFRA's first criterion asks whether government action substantially burdens the plaintiff's exercise of religion. 42 U.S.C. §§2000bb-1(a). Petitioners ably brief the right to religious freedom and the viability of Petitioners' claim of a substantial burden on their exercising their respective religions. Indeed, *Hobby Lobby* held that ACA's stiff penalties for failure to comply themselves constitute a substantial burden for RFRA purposes. *Hobby Lobby*, 134 S.Ct. at 2775-79. With respect to RFRA's first criterion, *amicus* Eagle Forum focuses on three issues: the relevant religious views on abortifacients; the strong link between the Administration's accommodation and any actions by employees to use their resulting health coverage; and the irrationality of the Administration's imposing the Mandate to redress sex discrimination.

### A. The Government lacks authority to set the contours of permissible religious thought.

In statements that unintentionally demonstrate how notice-and-comment rulemaking helps ensure "informed administrative decisionmaking," *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979), the Administration has repeatedly cited 62 Fed. Reg. 8610, 8611 (1997) and 45 C.F.R. §46.202(f) to argue that federal law rejects Petitioners' claim that the Plan B morning-after-pill and Ella week-after-pill are abortifacients. Indeed, the *Hobby Lobby* decision identifies this as the federal position, 134 S.Ct. at 2763 n.7, suggesting – misleadingly, if not outright inaccurately – that "federal regulations ... define pregnancy as beginning at implantation." *Id.* The Administration's position is both irrelevant and objectively wrong; in any event, this Court should correct its own misleading support for the concept that "federal regulations" uniformly deem pregnancy to occur at implantation.

As this Court recognized in *Hobby Lobby*, 134 S.Ct. at 2778, conscience rights are defined by the rights holder, not by the Government:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

*Texas v. Johnson*, 491 U.S. 397, 415 (1989) (*quoting West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943)). Religious freedom does not

"turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981). Accordingly, religious freedom neither begins nor ends with government-approved religiosity. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993) (finding unlawful restriction of a faith with animal sacrifice as a principal form of devotion). If *courts* cannot question the merits of one's religious views in religious-freedom cases, the Administration *a fortiori* cannot impose its religious views by administrative fiat or otherwise: "[Petitioners] drew a line, and it is not for us to say that the line [they] drew was an unreasonable one." *Thomas*, 450 U.S. at 714; *accord Hobby Lobby*, 134 S.Ct. at 2779. Petitioners have the right not to care what the Administration considers the beginning of life.

More importantly, the Administration is simply wrong about federal law. The cited regulation does indeed provide that "pregnancy encompasses the time period from implantation to delivery," 45 C.F.R. §46.202(f), but that entire regulation is confined by the limitation "as used in this subpart" (*i.e.*, 45 C.F.R. pt. 46, subpt. B), which is simply inapposite to ACA. *See* 45 C.F.R. §46.202. More importantly, in that regulation, HHS's predecessor did not reject a fertilization-based definition for all purposes, but rather adopted the implantation-based definition only "to provide an administerable policy" for the specific purpose of obtaining informed consent for participation in federally funded research:

> It was suggested that pregnancy should be defined (i) conceptually to begin at the time of fertilization of the ovum, and (ii) operationally by actual test unless the women has been surgically rendered incapable of pregnancy.
>
> While the Department has no argument with the conceptual definition as proposed above, it sees no way of basing regulations on the concept. Rather in order to provide an administerable policy, the definition must be based on existing medical technology which permits confirmation of pregnancy.

39 Fed. Reg. 30,648, 30,651 (1974). Thus, HHS's predecessor had "no argument" on the merits against recognizing pregnancy at fertilization, but declined for administrative ease and then-current technology. The resulting "administerable policy" merely sets a federal floor for obtaining the informed consent of human subjects in federally funded research.

A decision to set an arguable, limited-purpose floor (based on 1970s technology) for administrative expedience obviously cannot translate to the conscience context, where the question is whether individuals or institutions want to avoid participating in activities against their religious beliefs or moral convictions. Indeed, the same statute that required the 1974 rulemaking also enacted the Church Amendment, 42 U.S.C. §300a-7, to provide conscience-protection rights. *Compare* National Research Service Award Act of 1974, Pub. L. No. 93-348, §214, 88 Stat. 342, 353 (1974) (Church Amendment) *with id.* at §§202, 205, 88 Stat. at 349-

51 (informed consent in federally funded research). Significantly, the enacting Congress expressly rejected the Administration's position here by providing that the regulatory definitions would not trump an institution's religious beliefs or moral convictions:

> It is the intent of the Committee that guidelines and regulations established by ... the Secretary ... under the provisions of the Act do not supersede or violate the moral or ethical code adopted by the governing officials of an institution in conformity with the religious beliefs or moral convictions of the institution's sponsoring group.

S. Rep. No. 93-381 (1973), *reprinted in* 1974 U.S.C.C.A.N. 3634, 3655. Thus, federal law most emphatically does not define life and abortion as the Administration argues.

Indeed, quite the contrary, federal regulations also use a conception-based definition at other times: "Child means an individual under the age of 19 including the period from conception to birth." 42 C.F.R. §457.10; *see also* 67 Fed. Reg. 61,956, 61,963-64 (2002) (finding it unnecessary to define "conception" as "fertilization" because HHS did "not generally believe there is any confusion about the term 'conception'"). Indeed, the fertilization-based definition has a stronger historical, legal, and scientific foundation:

> All the measures which impair the viability of the zygote at any time between the instant of fertilization and the completion of labor

> constitute, in the strict sense, procedures for inducing abortion.

U.S. Dep't of Health, Education & Welfare, Public Health Service Leaflet No. 1066, 27 (1963). Scientifically, the pre-implantation communications or "cross talk" between the mother and the pre-implantation embryo establish life before implantation,[3] as recognized by embryology texts:

> Human development begins at fertilization when a male gamete or sperm unites with a female gamete or oocyte to form a single cell, a zygote. This highly specialized, totipotent cell marked the beginning of each of us as a unique individual.

Keith L. Moore & T.V.N. Persaud, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 15 (8th ed. 2008). This Court should have no difficulty in rejecting the Administration's ahistorical and unscientific legerdemain. This Nation was founded on principles of freedom of religion, not government-defined orthodoxy.

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[3] *See, e.g.*, Eytan R. Barnea, Young J. Choi & Paul C. Leavis, "*Embryo-Maternal Signaling Prior to Implantation*," 4 EARLY PREGNANCY: BIOLOGY & MEDICINE, 166-75 (July 2000) ("embryo derived signaling ... takes place prior to implantation"); B.C. Paria, J. Reese, S.K. Das, & S.K. Dey, "*Deciphering the cross-talk of implantation: advances and challenges*," SCIENCE 2185, 2186 (June 21, 2002); R. Michael Roberts, Sancai Xie & Nagappan Mathialagan, "*Maternal Recognition of Pregnancy*," 54 BIOLOGY OF REPRODUCTION, 294-302 (1996).

### B. The Administration's purported accommodation does nothing to shield employers from their employees' actions.

As in *Hobby Lobby*, the Administration likely will argue that the Administration's accommodation absolves a religious employer of any responsibility for actions that employees take under their health insurance.[4] Of course, the Administration likely will prefer terms like "attenuated" over "absolved," but the argument here is clearly one of absolution. The Administration is certain enough of its position to guarantee that Petitioners' God will agree. Viewed that way – from Petitioners' perspective – the Administration's position is plainly preposterous, and this Court should reject it.

The question in a temporal court such as this one would be one of but-for causation versus proximate causation:

> [W]e use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient.

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[4] *See, e.g., Geneva Coll. v. Sec'y U.S. HHS*, 778 F.3d 422, 439 (3d Cir. 2015) (collecting cases).

*Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (interior quotation omitted). The attenuation argument has two principal flaws, each fatal.

First, accepting Petitioners' view that abortion is a crime against innocent life, the Administration cannot guarantee that even a temporal court certainly would absolve Petitioners' complicity. *See, e.g.*, 18 U.S.C. §2 ("[w]hoever commits an offense ... or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal"); *Bush v. Sprague*, 51 Mich. 41, 48, 16 N.W 222, 225 (Mich. 1883) ("by reason of the connection it involves among the conspirators, [conspiracy] may cause individuals to be responsible, who, but for the conspiracy, would not be responsible at all"). Petitioners' health-insurance plans provide their employees what amounts to the gun; ACA and the Administration's accommodation provide the bullets. Absolution is far from certain.

Second, this Court already has decided that it – as a temporal court – will not second-guess religious beliefs, other than to ensure that plaintiffs express an "honest conviction" in their professed religion. *See Hobby Lobby*, 134 S.Ct. at 2779 (interior quotations omitted). For example, in *Thomas*, the plaintiff did not want to manufacture tank turrets – a mere part of a weapon – and this Court left that line-drawing exercise to his sincere religious beliefs. *Thomas*, 450 U.S. at 710, 715. The Court should do so again here, based on Petitioners' unquestionably sincere beliefs.

### C. The Mandate does not redress sex discrimination.

In the litigation over the Contraceptive Mandate in the lower courts, the Administration and its *amici* repeatedly have argued that the Contraceptive Mandate redresses sex discrimination, thereby providing a compelling interest that could trump religious freedom. To the contrary, discrimination because of pregnancy or the ability to get pregnant qualifies as sex discrimination only in the statutory employment context, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983), and only there because the Pregnancy Discrimination Act ("PDA") expressly said so. *Id.* By its terms, PDA does not apply here, although Congress remains free to amend ACA or PDA to make it apply.

Outside of that context, disparate treatment of a potentially pregnant person because of sex-neutral criteria (*e.g.*, opposition to abortion) is not discrimination *because of that person's sex*. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271-72 (1993). "While it is true ... that only women can become pregnant, it does not follow that every ... classification concerning pregnancy is a sex-based classification." *Id.* (interior quotations omitted); *Harris v. McRae*, 448 U.S. 297, 322 (1980). Instead, discrimination requires that "the decisionmaker ... selected or reaffirmed a particular course of action at least in part *because of*, not merely *in spite of*, its adverse effects upon an identifiable group." *Bray*, 506 U.S. at 271-72 (interior quotations omitted, emphasis added); *In re Union Pacific R.R. Employment Practices Litig.*, 479 F.3d 936, 944-45

(8th Cir. 2007) (no sex discrimination if health plans deny contraceptive coverage to both women and men). Moreover, although the Administration argues that women's health costs more than men's health, that is biology, and certainly not the government's fault. For equal-protection principles to apply, the discrimination must have been caused by the government unit involved, and mere societal discrimination provides no basis for class-conscious remedies. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 485 (1989).[5] With no sex-based discrimination legislatively found – or even "findable" – much less uniformly found nationwide, Congress could not have enacted ACA to cure sex discrimination. *U.S. v. Morrison*, 529 U.S. 598, 626-27 (2000). This Court cannot assume otherwise.

## II. THE MANDATE IS NOT A COMPELLING GOVERNMENTAL INTEREST.

RFRA's second criterion asks whether the challenged action furthers "a compelling governmental interest." 42 U.S.C. §§2000bb-1(b)(1). *Hobby Lobby* simply assumed *arguendo* that the Mandate met this criterion and decided the case on the clear failure to meet the third criterion. 134 S.Ct. 2779-80. *Amicus* Eagle Forum respectfully submits that the Mandate is *ultra vires* and thus not an interest at all, much less a *compelling* one.

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[5] Indeed, by paying women's full preventive-care burden but not also paying the same for men, ACA arguably would violate equal-protection principles, even if Congress had gone through the paces of invoking Section 5 of the Fourteenth Amendment.

No party has asked this Court to vacate the Mandate, but the Petitioners do ask the Court to recognize that the Mandate does not further a "compelling interest" under RFRA: "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Instead, "[h]aving raised a [RFRA] claim in the [lower] courts, ... petitioners could have formulated any argument they liked in support of that claim here." *Id.* at 535. For this RFRA criterion, *amicus* Eagle Forum focuses on the bases that this Court has for interpreting ACA to exclude contraceptive-coverage mandates from the rubric of "preventive care and screening" under 42 U.S.C. §300gg-13(a)(4).

As Justice Kennedy explained in *Hobby Lobby*, "defining the proper realm for free exercise can be difficult" "in a complex society and an era of pervasive governmental regulation." 134 S.Ct. at 2785 (Kennedy, J., concurring). While less difficult, it remains equally important to define the proper realm carved out for the federal government in fields such as health care and insurance that the states have long occupied, with superior claims to a police power to protect the public health and safety. When viewed from the twin standpoints of federalism in our dual-sovereignty system and of separation-of-powers in our constitutional system, it is clear that Congress did not authorize the Mandate here when it required free coverage for "preventive care and screening" in 42 U.S.C. §300gg-13(a)(4). This Court should not elevate the Administration's executive

policy – adopted without actual statutory authority – over the free-exercise rights that Congress did enact.

### A. Congress has never found – in ACA or otherwise – an affirmative entitlement to free access to a broadly defined concept of health.

With the disconnect between ACA's statutory preventive-care mandate and the Administration's regulatory Contraceptive Mandate, it is important to understand what "preventive care" is and what it is not. In its abortion cases, this Court has understood the woman's health broadly: "all factors – physical, emotional, psychological ... – relevant to [her] well-being." *Bolton*, 410 U.S. at 192. But that broad standard concerns only what courts must consider in enforcing rights that government cannot take away under the Fourteenth Amendment. It says nothing about what the government must provide to women under its other enumerated powers. *McRae*, 448 U.S. at 325-26 (distinguishing between "freedom of choice in the context of certain personal decisions" like medically indicated abortions and "entitlement to such funds as may be necessary to realize all the advantages of that freedom"). Here, the question is what *Congress* affirmatively requires.

Since ACA concerns health insurance, it does include medically indicated treatments for medical diseases (*e.g.*, pulmonary hypertension, Marfan Syndrome), but the Contraceptive Mandate does not apply to such situations; other insurance provisions apply. Instead, the Mandate applies to "elective" use of contraceptives and abortifacients for nothing other than to avoid or end pregnancy. While *Bolton*'s broad

definitions – *e.g.*, emotions or psychology – might prevent governmental interference with the elective uses of these drugs, that is not the same as an entitlement to free drugs. As outlined in this Section, the canons of statutory construction do not support a broad entitlement to free contraceptives in ACA. Quite the contrary, Congress has frequently held that conscience rights – such as those Petitioners assert here – are protected against infringement.[6] A compelling interest must come from congressional findings and authority, not administrative musing.

### B. The canons of statutory construction favor this Court's construing ACA narrowly to exclude authority for the Contraceptive Mandate.

This section identifies several canons of statutory construction that argue against the Administration's reading "preventive care" expansively to include the purely elective use of contraceptives not to prevent disease, but to prevent pregnancy.

#### 1. ACA's plain language does not suggest elective contraceptives coverage.

The language that Congress used – "preventive care" – is the best evidence of what Congress wanted ACA to cover without charge. *CSX Transp.*, 507 U.S. at 664. That statutory language, *amicus* Eagle

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[6] *See, e.g.*, 42 U.S.C. §§300a-7, 238n; Pub. L. No. 111-117, §508, 123 Stat 3034, 3280 (2009) (annual "Weldon Amendment" contemporaneous with ACA's enactment).

Forum respectfully submits, suggests the prevention of disease, especially in this health-care context. Moreover, with contraceptives, there is a clear split between medically indicated contraception to prevent disease and merely elective contraception to avoid pregnancy. If Congress intended to cover only the former, the Administration lacks authority to expand ACA's coverage.

Medical advisers at FDA – the relevant agency within HHS – have long recognized this divide:

> The oral contraceptives present society with problems unique in the history of human therapeutics. Never will so many people have taken such potent drugs voluntarily over such a protracted period *for an objective other than for control of disease.*

U.S. Food & Drug Admin., Advisory Committee on Obstetrics and Gynecology, Report on the Oral Contraceptives, 1 (1966) (emphasis added). Indeed, any informed citizen old enough to be a member of Congress would be aware of the same divide. Against that background, the Administration would have this Court believe that Congress intended administrative rulemakings to fill the gaps, but accepting that view would require this Court to cast Congress in a very dim light, as the following sections explain.

### 2. The McCarran-Ferguson Act requires this court to reject the Mandate as preempting state law.

The McCarran-Ferguson Act requires a special deference to state law in regulating the business of insurance from both dormant federal power and laws enacted by Congress:

> Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating ... the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, *whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation.*

*Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946) (emphasis added); *accord Fabe*, 508 U.S. at 500; *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003). Here, nothing in ACA suggests that the Administration has the authority to override state insurance law for contraceptives and abortifacients.

If these coverage questions involved the business of insurance, ACA would need to authorize the Administration's actions via a statutory command. Here, the phrase "business of insurance" obviously includes the coverage questions generally:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was – it was on the relationship between the insurance company and the policyholder.

*SEC v. Nat'l Securities, Inc.*, 393 U.S. 453, 460 (1969); *accord Fabe*, 508 U.S. at 501. While the phrase "business of insurance" clearly includes the types of coverage issues raised here, it is less clear that ACA itself, as interpreted by *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012) ("*NFIB*"), qualifies as an "Act [that] specifically relates to the business of insurance." 15 U.S.C. §1012(b).

Rather than regulating insurance *per se*, ACA is more of an elaborate tax exemption:

> imposition of [§5000A's] tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice. ... Those subject to the individual mandate may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax.

*NFIB*, 132 S. Ct. at 2600 & n.11. Under the McCarran-Ferguson Act, therefore, at least for the individual market, ACA's minimum essential coverage provisions do not preempt state insurance law. Instead, they simply note the tax consequences of having or not having the specified plan provisions. In that respect, ACA's employer mandate is the same as its individual mandate: not a mandate at all, but merely an elaborate tax exemption for avoiding tax penalties. *Compare* 26 U.S.C. §4980H *with id.* §5000A. In sum, ACA does not regulate the "business

of insurance" under the McCarran-Ferguson Act and thus does not preempt state insurance law.

### 3. The presumption against preemption applies.

Although the federal government has been in the field of medical insurance under the Spending Clause for federal insurance programs paid for by the United States, ACA represents a further federal expansion into several fields and sub-fields already occupied by the states, particularly private health insurance *not* funded under the Spending Clause. Because the fields of insurance generally, preventive-care coverage specifically, and conscience exceptions all are fields that the states occupied before ACA's and the Administration's intrusions, the Administration necessarily contends that not only ACA but also the its Contraceptive Mandate preempts state law. This Court should reject that contention – and the Administration's underlying misinterpretation of ACA – because there is no supporting evidence.

Federal courts should "never assume[] lightly that Congress has derogated state regulation, but instead [should] address[] claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). Accordingly, under this Court's preemption analysis, all fields – and especially ones traditionally occupied by state and local government – require courts to apply a presumption against preemption. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Santa Fe Elevator*, 331 U.S.

at 230. When this presumption applies, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator*, 331 U.S. at 230; *Wyeth*, 555 U.S. at 565. Significantly, even if Congress had preempted *some* state action, the presumption against preemption applies to determining the *scope* of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). As explained below, the presumption against preemption applies here and requires this Court to reject the Administration's expansive interpretation of the statutory phrase "preventive care."

Even with obviously preemptive statutes, the presumption against preemption applies to limit the scope of that preemption. *Medtronic*, 518 U.S. at 485. Courts "rely on the presumption because respect for the States as independent sovereigns in our federal system leads [courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth*, 555 U.S. at 565 n.3 (internal quotations omitted). For that reason, "[t]he presumption ... accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* For example, *Santa Fe Elevator*, 331 U.S. at 230, cited a 1944 decision where 21 states regulated warehouses. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 148-49 (1944). Under those circumstances, the

presumption applied to prevent warehouses' coming under federal regulation of "public utilities" without any apparent congressional consideration of whether warehouses should qualify as "public utilities," even if they fit the statute's literal definition. *Id.* Notwithstanding the literal application of the federal statute, the presumption prevented the federal law's overstepping traditional state regulation in the absence of something much more explicit from Congress.[7]

"Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens." *Medtronic*, 518 U.S. at 475. First, of course, the states long have regulated health insurance generally. *See Travelers Ins.*, 514 U.S. at 654. Second, as part of that regulation, states have regulated the types of mandatory preventive care that insurance policies in that state must cover and the terms on which they must cover them.[8] Third, as part of both forms of regulation, states

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[7] The presumption against preemption is not limited to states with relevant laws displaced by the federal law in question. Petitioners in states without such laws could point to state occupation of the field, in other states, to argue for interpreting federal law narrowly in their states.

[8] *See, e.g.*, ALA. CODE §16-25A-1(8)(iv); ARK. CODE. ANN. §23-79-141; COLO. REV. STAT. §10-16-104(18); IND. CODE §27-8-24.2-10; KY. REV. STAT. §205.6485; MASS. GEN. LAWS ch. 175 §47C; MICH. COMP. LAWS ANN. §500.3501(b)(ix); MICH. ADMIN. CODE r. 325.6125(d)(ii) (2014); MINN. STAT. §§62J.01, 62J.04(3)(7), 62A.047; OKLA. STAT. tit. 36, §6907(B); 72 PA. CONS. STAT. §3402b.5 (2014); W. VA. CODE §16-2J-1.

have regulated the extent to which conscience rights apply to health insurance with respect to abortion and contraception.[9] Taken together, ACA and the Contraceptive Mandate clearly intrude into fields that the states historically have occupied.

Given both that the states were heavily involved in all relevant aspects of insurance generally, preventive care, and conscience rights and that Congress did not provide clear and manifest evidence of its intent to preempt these state laws, this Court must interpret the statutory phrase "preventive care" narrowly in order to avoid impinging on state-protected rights of conscience as well as discretion on what preventive care to cover. Where this Court *can* use a narrow interpretation to avoid preemption, *Altria Group*, 555 U.S. at 77, this Court *should* do so.

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[9] *See, e.g.*, ARIZ. REV. STAT. §20-826(Z); ARK. CODE ANN. §20-16-304; CAL. HEALTH & SAFETY CODE §1367.25; CAL. INS. CODE §10123.196; COLO. REV. STAT. §25-6-102; CONN. GEN. STAT. §§38a-503e(b)(1), 38a-530e(b)(1); FLA. STAT. ANN. §381.0051(5); HAW. REV. STAT. §431:10A-116.7; LA. REV. STAT. §40:1299.31; 24 ME. REV. STAT. §2332-J(2); NEB. REV. STAT. §28-338; N.J. STAT. ANN. §17:48-6ee; N.Y. INS. LAW §§3221(l)(8), 4303(j); N.C. GEN. STAT. §58-3-178; TENN. CODE ANN. §68-34-104; *cf.* W. VA. CODE §16-2B-4 (public employees); *see also* Erica S. Mellick, *Time for Plan B: Increasing Access to Emergency Contraception and Minimizing Conflicts of Conscience*, 9 J. HEALTH CARE L. & POL'Y 402, 419, 429-30 (2006). Although the foregoing authorities predate ACA, states have continued to add to their regulations in these fields. *See, e.g.*, 2012 Ariz. Legis. Serv. 337 (West); 2012 Kan. Sess. Laws 112, §1, ch. 337, §1; 2012 Mo. Laws 749, §A.

In administrative-law terms, "*Chevron* step one" requires courts to employ "traditional tools of statutory construction" to determine congressional intent, on which courts are "the final authority." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Only if the attempt to interpret the statute is inconclusive does a federal court go to "*Chevron* step two," where a court would defer to a plausible agency interpretation of an ambiguous statute. *Id.* at 844. Where (as here) the presumption against preemption applies, *Chevron* deference would be inappropriate.

In a dissent joined by the Chief Justice and Justice Scalia, and not disputed in pertinent part by the majority, Justice Stevens called into question the entire enterprise of administrative preemption vis-à-vis the presumption against preemption:

> Even if the OCC did intend its regulation to pre-empt the state laws at issue here, it would still not merit *Chevron* deference. No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance.

*Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Stevens, J., dissenting). Significantly, *Watters* arose under banking law that is more preemptive than federal law generally. *Id.* at 12 (majority). The Courts of Appeals have adopted a similar approach against finding preemption under

these circumstances.[10] Clearly federal agencies – which draw their delegated power from Congress – cannot have a freer hand here than Congress itself.

The presumption against preemption should guide the Court's allocation – here, denial – of deference to federal agencies in the face of courts' constitutional obligation to defer to independent state sovereigns, *Santa Fe Elevator*, 331 U.S. at 230, and to interpret the statute that Congress wrote, *CSX Transp.*, 507 U.S. at 664, with its presumptively controlling ordinary meaning. *Morales*, 504 U.S. at 383. In essence the presumption against preemption is the tool of statutory construction that enables this Court to answer the statutory question at *Chevron* step one, *Chevron* 467 U.S. at 843 n.9, without resort to the Administration's interpretive gloss.

### 4. The Administration cannot interpret ACA to raise serious questions under the nondelegation doctrine.

The non-delegation doctrine derives from Article I, section 1's vesting all legislative power in the

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[10] *See Nat'l Ass'n of State Utility Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1252-53 (11th Cir. 2006) ("[a]lthough the presumption against preemption cannot trump our review ... under *Chevron*, this presumption guides our understanding of the statutory language that preserves the power of the States to regulate"); *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 247-51 (3d Cir. 2008); *Massachusetts Ass'n of Health Maintenance Organizations v. Ruthardt*, 194 F.3d 176, 182-83 (1st Cir. 1999); *see also Albany Eng'g Corp. v. F.E.R.C.*, 548 F.3d 1071, 1074-75 (D.C. Cir. 2008); *Massachusetts v. U.S. Dept. of Transp.*, 93 F.3d 890, 895 (D.C. Cir. 1996).

Congress. U.S. CONST. art. I, §1. Under this doctrine, Congress cannot abdicate or transfer to others the essential legislative functions with which it is thus vested. Congress can, however, delegate legislative authority, so long as it provides "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *U.S. v. Mistretta,* 488 U.S. 361, 372 (1989). To be sure, broad delegations have passed muster under the non-delegation doctrine, including the defining of "excessive profits," "unfair or inequitable distribution of voting power among security holders," "fair and equitable" commodity pricing, "just and reasonable rates," and "regulat[ing] broadcast licensing as public interest, convenience, or necessity require." *Id.* at 373-74 (interior quotations omitted). But our Constitution does not allow administrative agencies to enact regulations with the force of law contrary not only to numerous congressional enactments – *e.g.*, RFRA, the McCarran-Ferguson Act, the plain meaning of the ACA phrase "preventive care" – but also to the presumption against preemption and the First Amendment.

ACA provides no intelligible principle in 42 U.S.C. §300gg-13(a)(4) to guide the Administration's expansion from "preventive care and screening" to contraceptives and abortifacients, all without any congressional findings under the General Welfare Clause. *See* Section II.A, *supra.* The Constitution does not allow Congress to write the Administration a blank check to circumvent state authority.

Moreover, a court need not *decide* the delegation question in order to disregard the Administration's

expansive reading of ACA. It is enough that the narrow reading of "preventive care" avoids a difficult constitutional question. The canon of constitutional avoidance interprets statutes "to *avoid* the decision of constitutional questions" by "choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Suarez Martinez*, 543 U.S. 371, 381 (2005). Federal agencies must consider avoidance issues in interpreting laws, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247, 2258-59 (2013), which the Administration has roundly failed to do here.

### C. The Mandate is *ultra vires* and – as such – cannot be a compelling interest.

In ACA, a federal government that lacks a police power to regulate public health and safety, *Morrison*, 529 U.S. at 618-19 ("we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"), chose to regulate in the state-occupied fields of public health and health insurance, *Medtronic*, 518 U.S. at 475; *see* notes 8-9, *supra*, implicating multiple presumptions against interpreting federal law broadly to displace state authority. Sections II.B.2-II.B.4, *supra*; *see also U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (same). Nonetheless, the Administration would have this Court deem Congress so ignorant of

federal law and this Court's decisions that Congress failed to make its views clear.

The Administration's position is further complicated by this Court's having already made clear that pregnancy is not a disease in federal statutes, *Young v. UPS*, 135 S.Ct. 1338, 1353 (2015); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 140 (1977), unless Congress makes clear otherwise, something that the PDA shows that Congress knows how to do. *Young*, 135 S.Ct. at 1353. With respect to RFRA, Congress knows that a subsequently enacted federal law "[will be] subject to [RFRA] unless such law explicitly excludes such application by reference to [RFRA]." 42 U.S.C. §2000bb-3(b). Again, here, the Administration would have this Court assume that Congress knew it had treaded into a field rife with religious-freedom issues, but chose not to protect what the Administration contends was Congress' intent: to trammel on religious freedom by forcing nuns to pay for birth control and abortifacients.

Taking all these interpretive strands together, *amicus* Eagle Forum respectfully submits that this Court should decline to view the legislative branch as being so incompetent and mean-spirited. Instead of suspecting that Congress would "hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001), the alternative is obvious: reject the Administration's position that ACA intended "preventive care" to require free access to elective drugs in the first place. Under this alternate view, the challenged agency actions cannot survive RFRA because agencies cannot create compelling governmental interests: "Agencies may

play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval,* 532 U.S. 275, 291 (2001). For there to be a compelling federal interest in the type of infringement visited by the Mandate on religious-freedom rights, the decision needs to have come from Congress.

When *Congress* enacts legislation for the General Welfare, it is "irrelevant" "[w]hether the chosen means appear 'bad,' 'unwise,' or 'unworkable'" to this Court. *Buckley v. Valeo,* 424 U.S. 1, 91 (1976). Under Article I, it is "irrelevant" because "Congress has concluded that the means are 'necessary and proper' to promote the general welfare." *Id.* But Congress made no such finding here. All that Congress did was to require "preventive care and screening," which in no way suggests abortifacients or contraceptives.[11]

*Amicus* Eagle Forum respectfully submits that, as with the *Bolton-McRae* dichotomy between rights that this Court finds in Fourteenth Amendment that government cannot abridge versus decisions that the legislative branch must make on what entitlements to provide, the marginal autonomy that some women gain from the Mandate is not even a governmental interest – much less a compelling one – until *the legislature* makes it so. While "[t]he ability of women to participate equally in the economic and social life

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[11] To be clear contraceptive drugs and devices can be prescribed for medically indicated purposes, which are distinct from their purely elective use by the general population as mere contraceptives. FDA Advisory Committee, Report on the Oral Contraceptives, at 1 (quoted *supra*).

of the Nation has been facilitated by their ability to control their reproductive lives," *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992), that *personal* interest is not necessarily a *governmental* interest; for example, that personal interest might *harm* the national interest if birth rates declined sufficiently. *See* Ruchir Sharma, *How the Birth Dearth Saps Economic Growth: Worries about migrants miss that to avoid decline, Europe and the U.S. need many more people*, WALL ST. J., Sept. 24, 2015, at A17 That situation presumably would not empower legislatures to void the personal interest, but it demonstrates that governmental interests do not always align with personal interests, as the *Bolton-McRae* dichotomy demonstrates.

This Court has never held that an administrative agency has the constitutional power to make findings under the General Welfare Clause. Particularly in concert with the non-delegation doctrine (Section II.B.4, *supra*) and the presumption against preemption (Section II.B.3, *supra*), this Court cannot allow the Administration to invent new and unfamiliar laws out of whole cloth, without a finding (or express enactment) *by Congress*.

### D. The proffered governmental interests would not be compelling, even if Congress had made them.

To the extent that Congress had adopted findings or that a mere administrative agency could make findings that an interest is compelling, the Mandate still would fail. First, as explained in Section I.C, *supra*, there is no equal-protection issue supporting the Mandate, which indeed itself violates equal

protection. Second, the Administration cannot rely on women for whom drugs *are* medically indicated to combat disease as a justification to provide the same drugs to healthy women for whom the drugs *are not* medically indicated. Because it seeks to solve a non-existent problem (sex discrimination) or is simply inapposite (relying on unique medical indications to support access for all women), the Contraceptive Mandate is arbitrary and capricious – not compelling – as a government interest.

## III. THE MANDATE'S ACCOMMODATION IS NOT THE LEAST RESTRICTIVE ALTERNATIVE UNDER RFRA.

RFRA's third criterion asks whether "application of the burden to the person ... is the least restrictive means of furthering" the government's compelling interest. 42 U.S.C. §§2000bb-1(b)(2). In *Hobby Lobby*, the Administration's enforcement regime could not meet this "exceptionally demanding" test because the accommodation challenged here was less restrictive than the enforcement regime that the *Hobby Lobby* plaintiffs faced. 134 S.Ct. 2780-82. The question now is whether any still-less restrictive options exist, as Petitioners claim. For this RFRA criterion, *amicus* Eagle Forum focuses on two options: the Court could simply recognize an exception on religious grounds (as many states had done); and Congress could enact a program to provide benefits to affected employees if Congress viewed ACA even to reach the interests that the Administration asserts here.

## CONCLUSION

For the foregoing reasons and those argued by Petitioners, this Court should hold that ACA's mandates are unenforceable.

Dated: January 11, 2016 Respectfully submitted,

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